STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2006
v	No. 263439 Calhoun Circuit Court
AMIEL KEVIN TUMPKIN, Defendant-Appellant.	LC No. 2004-001098-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison without possibility of parole for the murder conviction and to a mandatory consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On the morning of March 2, 2004, defendant and the victim argued and physically fought. Immediately thereafter, several witnesses observed defendant shoot the victim in the back. When the wounded victim fell to the ground, defendant shot him in the head at close range. The victim died as a result of the gunshot wound to his head.

Officer Mark Kusler observed defendant run from the scene of the shooting, kneel, and lay down on the ground. Defendant appeared to be in pain from an injury to his head, but seemed to understand the questions posed to him by Officer Kusler and answered the questions clearly. Officer Kusler testified that defendant's behavior appeared theatrical. Later that morning, defendant received treatment for his head injury. Dr. James Nolin testified that defendant was uncooperative and agitated upon his arrival at the hospital. Defendant did not respond to commands properly, his speech was garbled, and he thrashed his limbs. Dr. Nolin ultimately determined, however, that defendant did not have a serious head injury. Dr. Nolin suspected that defendant's behavior upon entering the hospital might have been an act.

Detective Brad Wise interviewed defendant at the hospital the day after the shooting. Defendant voluntarily agreed to answer questions, gave responsive answers, and spoke clearly and lucidly. Defendant told Detective Wise that he accidentally fired the victim's gun three or four times while having an argument with the victim. Defendant confessed that he intentionally shot the victim again after the victim fell to the ground.

Defendant first argues that Officer Kusler and Dr. Nolin impermissibly offered opinions outside their area of expertise. We review unpreserved evidentiary claims for plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings, independent of his innocence." *Id*., citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant claims that Officer Kusler offered impermissible expert opinion regarding defendant's state of mind by testifying that defendant appeared to be acting or behaving theatrically after the shooting. Officer Kusler was not qualified as an expert; therefore, MRE 701 governs the admission of his testimony. MRE 701 permits lay witness' testimony in the form of opinions and inferences that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." We have held that the opinions of police officers who have not been qualified as experts are admissible under MRE 701 if they arise from the officers' observations, they are generally based on common sense, and they are not overly dependent upon scientific expertise. *Richardson v Rider Truck Rental, Inc*, 213 Mich App 447, 455-456; 540 NW2d 696 (1995); *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988).

Officer Kusler essentially testified that defendant's behavior after the shooting might have been an act because the behavior appeared to be inconsistent with the severity of the head injury Officer Kusler observed. Officer Kusler based his opinion on his own perception of defendant's injury and overall behavior, as well as on his experience with other head-injury victims. He did not offer a scientific opinion regarding defendant's psychological condition. The challenged opinion was not dependent on scientific expertise and was admissible pursuant to MRE 701. See, e.g., *People v McLaughlin*, 258 Mich App 635; 672 NW2d 860 (2003).

Defendant additionally claims that Dr. Nolin offered an opinion outside his expertise by testifying that defendant's behavior at the hospital may have been an act. The extent of a witness's expertise is usually for the jury to decide. *People v Whitfield*, 425 Mich 116, 123-124; 388 NW2d 206 (1986). Dr. Nolin testified that it is important for medical professionals to observe the behavior of a head-injury victim to determine whether the victim suffered a serious internal injury. This is not the type of opinion that requires a scientific, psychiatric evaluation. Dr. Nolin's opinion regarding defendant's behavior was well within his expertise and was admissible.

Moreover, even assuming that the challenged testimony of Officer Kusler and Dr. Nolin was erroneously admitted, there is no basis on which we can conclude that the admission of the testimony was outcome determinative in this case. See *Carines*, *supra* at 763. To establish first-degree murder, under MCL 750.316, the prosecutor must show that defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 495-496; 473 NW2d 755 (1991). Defendant asserts that any evidence suggesting that he lacked intent, premeditation, and deliberation was negated by testimony that his behavior after the shooting was an act. But the challenged testimony was not the only evidence indicating that defendant shot the victim in the head with premeditation and deliberation. Several witnesses testified that defendant and the victim were involved in an ongoing dispute; that they argued on the morning of the shooting; that defendant shot at the victim more than once; and that defendant

paused before shooting the victim in the head. See *People v Bowman*, 254 Mich App 142, 151-152; 656 NW2d 835 (2002); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Given this overwhelming evidence of premeditation and deliberation, defendant has failed to establish plain error affecting his substantial rights.

Alternatively, defendant argues that his trial counsel was ineffective for failing to object to the challenged testimony. Whether defendant was denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). Ordinarily, the trial court's factual findings are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id*. at 484-485. Here, however, the trial court was not presented with and did not rule on defendant's claim. Therefore, our review is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Considering that the challenged opinion testimony regarding defendant's behavior after the shooting was proper, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). And, in light of the evidence of defendant's guilt, as well as the trial court's limiting instruction regarding the testimony of police officers and expert witnesses, defendant cannot establish that an objection by defense counsel would have changed the outcome of the case. *Id*.

Defendant next argues that defense counsel was ineffective by failing to move to suppress his confession. Again, our review is limited to the existing record. *Rodriguez*, *supra* at 38.

In evaluating defense counsel's performance, we must analyze the admissibility of defendant's confession. A statement of an accused made during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Whether a waiver of *Miranda* rights was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently given are separate prongs of a two-part test for a valid waiver of *Miranda* rights. *People v Daoud*, 462 Mich 621, 632-634; 614 NW2d 152 (2000). Further, whether a defendant's statement was knowing, intelligent, and voluntary is a question of law to be determined based on the totality of the circumstances. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000).

Defendant asserts that he did not voluntarily waive his *Miranda* rights or make a confession. He also asserts that he was incompetent to waive his *Miranda* rights and make a voluntary confession because he had cocaine, marijuana, and morphine in his system. Several factors are to be considered when evaluating a statement for voluntariness including, but not

limited to, the repeated and prolonged nature of the questioning, whether the defendant was injured, intoxicated or drugged, or in ill health when he gave the statement, and whether the defendant was deprived of food, sleep, or medical attention. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). While drug induced intoxication can affect the voluntariness of a confession, it is not dispositive of the issue. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987).

Defendant received his final dose of morphine at least nine hours before his hospital interrogation and, although defendant had marijuana and cocaine in his system when he was admitted to the hospital, no evidence was presented with regard to when defendant actually ingested the substances. The prosecutor presented evidence that defendant's speech was lucid at the time of the interrogation. On this record we cannot conclude that defendant's confession was affected by his alleged drug intake. Moreover, there is no evidence that the confession was not voluntarily given. The confession was therefore properly admitted at trial.[1]

Because defendant's confession was admissible, any motion by defense counsel to suppress the confession would have been futile. Defense counsel is not ineffective for failing to argue frivolous or meritless motions. *People v Dardin*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Furthermore, defendant cannot establish that defense counsel's failure to object affected the outcome of the case. *Henry*, *supra* at 145-146. Defendant asserts that the jury would have determined that the shooting was accidental in the absence of his confession. But, as previously discussed, even in the absence of defendant's confession the evidence presented was sufficient to support a finding that defendant shot the victim in the head with premeditation and deliberation.

Finally, defendant argues that admission of evidence that he sold drugs, that he assisted others in selling drugs, and that he used drugs prior to being admitted to the hospital, was unfairly prejudicial. This unpreserved evidentiary claim is reviewed for plain error affecting substantial rights. *Knox*, *supra* at 508.

Evidence of an individual's crimes, wrongs, or bad acts is inadmissible to show a propensity to commit such acts. MRE 404(b); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). But such evidence may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act . . . absence of mistake or accident when the same is material . . . ." MRE 404(b). The evidence must be

[1] Defendant compares the circumstances surrounding his confession to those in *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978), when police coerced Mincey into making incriminating statements. But the facts in the present case are materially distinguishable from those in *Mincey*. Although both Mincey and defendant were hospitalized when they were interrogated, defendant was only in a "little bit of pain" and the interrogation lasted only ten minutes. Mincey was in severe pain and the police interrogated him for almost four hours. *Id*. at 396-399. According to Detective Wise, defendant indicated that he understood his *Miranda* rights and that he was willing to waive them. Although defendant spoke softly, he gave responsive answers. Mincey could only communicate by writing, and some of his responses were incoherent. *Id*. Moreover, unlike Mincey, defendant did not request the presence of counsel or to have the interrogation cease. *Id*.

offered for a proper purpose under MRE 404(b), must be relevant under Rule 402 as enforced through Rule 104(b), and the probative value of the evidence must not be substantially outweighed by unfair prejudice. Additionally, the trial court may, upon request, provide a limiting instruction to the jury. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

Defendant concedes that the challenged evidence was offered for a proper purpose and that it was relevant to establishing motive, but argues that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Defendant argues that this evidence was unfairly prejudicial because it disparaged his character. In support of this argument defendant refers to the prosecutor's references in his closing argument to the "drug culture." But review of the prosecutor's closing argument in context reveals that the prosecutor used the challenged evidence to create a context for the victim's murder and to reveal defendant's motive for killing him. Although the challenged evidence was damaging to defendant's position, the probative value of the evidence substantially outweighed any danger of unfair prejudice.

We reject defendant's suggestion that the jury likely gave preemptive weight to the challenged evidence because the trial court did not offer a limiting instruction with respect to the evidence. Even in the absence of a limiting instruction we cannot conclude that the admission of this evidence was outcome determinative. *Carines*, *supra* at 763. There was an overwhelming amount of evidence of defendant's guilt, most of which was wholly unrelated to his involvement in drug-related activities. Defendant has failed to show plain error affecting his substantial rights.

Alternatively, defendant argues that his trial counsel's failure to object to the admission of the challenged evidence and to request a curative instruction amounted to ineffective assistance of counsel. Because the challenged evidence was properly admitted at trial, any objection by defense counsel would have been futile. *Thomas*, *supra* at 457.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot